Supreme Court, U.S.
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No. 09-____

IN THE

Supreme Court of the United States

CARNIVAL CORPORATION,
Petitioner,

v.

PULIYURUMPIL MATHEW THOMAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CATHERINE E. STETSON
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491

CURTIS J. MASE*
VALENTINA TEJERA
MASE, LARA, EVERSOLE, P.A.
80 S.W. 8th Street
Suite 2700
Miami, Florida 33130
(305) 377-3770

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an agreement to arbitrate that is otherwise enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is *per se* void and unenforceable as to a U.S. statutory claim because it requires application of foreign law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Carnival Corporation ("Carnival"), d.b.a. Carnival Cruise Lines, Inc. Carnival is a publicly traded company whose common stock is listed on the New York Stock Exchange. No publicly held company owns ten percent or more of Carnival's stock. Carnival was defendant in the District Court and appellee before the United States Court of Appeals for the Eleventh Circuit.

Respondent Puliyurumpil Thomas was plaintiff in the District Court and appellant before the United States Court of Appeals for the Eleventh Circuit.

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PULIYURUMPIL MATHEW THOMAS,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Carnival Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 573 F.3d 1113 and is reproduced at page 1a of the appendix to this petition ("App."). The order denying Carnival's petition for rehearing en banc is reproduced at App. 37a. The opinion of the District Court compelling arbitration is not reported and is reproduced at App. 27a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on July 1, 2009. On September 2, 2009, the Eleventh denied a timely filed petition for rehearing or rehearing en banc. App. 37a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act, 9 U.S.C. §§ 202, *et seq.*, the Seaman's Wage Act, 46 U.S.C. § 10313 (Wage Act), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), are set out in the appendix to this petition. App. 39a-52a

INTRODUCTION

STATEMENT OF THE CASE

A. The Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), App. 43a-52a, is a multi-lateral treaty; it requires signatory states to recognize and enforce arbitral awards made in other signatory states. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 530 n.10 (1974). The United States is one of over 140 Convention signatories, and Chapter 2 of the Federal Arbitration Act (FAA) incorporates its terms. *See* 9 U.S.C. §§ 201, *et seq.*

The Convention's Article II requires signatory states to recognize written arbitration agreements, and "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, * * * [to] refer the parties

to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." App. 44a. Article III relatedly requires each contracting state to recognize arbitral awards as binding. *Id.*

The Convention's Article V details the circumstances in which a signatory state's court (or other authority) may refuse to recognize and enforce an arbitral award. Among other things, an award may be "refused" on proof that the parties to the agreement were under some incapacity or the agreement was invalid under law; a party was not given notice of the arbitrator's appointment; the award exceeded the scope of the arbitration; or the award has been set aside. App. 45a-46a. An arbitral award may also be refused if the court concludes that "the subject matter of the difference is not capable of settlement by arbitration under the law of that country." App. 46a. Finally, recognition and enforcement of an arbitral award may * * * be refused if the competent authority in the country where recognition and enforcement is sought finds that * * * [t]he recognition or enforcement of the award would be contrary to the public policy of that country." App. 47a.

B. Background Facts

Respondent Thomas is a foreign citizen residing in India. He once worked as a waiter aboard the Carnival ship *Imagination*, which operated under a Panamanian flag.[1] In 2004, Thomas allegedly was

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[1] The ship's country of registration "determines the laws under which the ship is required to operated and to be applied in relevant admiralty cases." App. 4a n.4.

injured in a shipboard fall and left work for a time, returning to the ship in January 2005. App. 28a. In October of that year, Thomas and Carnival entered into a Seafarer's Agreement containing the following arbitration and choice-of-law clauses:

> 7. Arbitration. Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer's service on the vessel, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. * * * The place of arbitration shall be London, England, Monaco, Panama City, Panama or Manila, Philippines whichever is closer to Seafarer's home country. The Seafarer and Cruise Line must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions.
>
> * * *
>
> 8. Governing Law. This agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer's service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder. The parties agree to this governing law notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical

> care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction. [App. 58a-59a.]

Thomas was deemed unfit for duty and was medically "signed off" from the vessel in December 2005. App. 29a. Thomas subsequently filed a lawsuit in Florida state court against Carnival, bringing claims of negligence under the Jones Act, 46 U.S.C. § 688;[2] unseaworthiness;[3] failure to pay maintenance and cure;[4] and failure to pay wages under the Wage Act, 46 U.S.C. § 10313. *See* App. 29a-30a.

C. Proceedings Below

Carnival removed Thomas's state-court action to the United States District Court for the Southern District of Florida under 9 U.S.C. § 205, because Thomas's action arose under the laws and treaties of the United States and related to an arbitration agreement falling under the Convention. *See Bautista* v. *Star Cruises*, 396 F.3d 1289, 1294 (11th

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[2] "A Jones Act claim is an *in personam* action for a seaman who suffers injury in the course of employment due to negligence of his employer, the vessel owner, or crew members." *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001).

[3] "Unseaworthiness" is a maritime law claim based on the vessel owner's duty to ensure that a vessel is reasonably fit to be at sea. *Id.*; *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S 539, 550 (1960).

[4] "Maintenance and cure" describes a common-law remedy for injuries seamen sustain in the course of service. *See, e.g.*, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001) ("A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.").

Cir. 2005) ("A case covered by the Convention confers federal subject matter jurisdiction upon a district court because such a case is 'deemed to arise under the laws and treaties of the United States.' ") (quoting 9 U.S.C. § 203). And because the parties' Seafarers' Agreement mandated arbitration, Carnival sought in the federal trial court to compel arbitration.

Agreeing with Carnival both that the mandatory arbitration clause applied and was enforceable, the District Court compelled arbitration of Thomas's claims. App. 27a-36a. As the court explained, each of the jurisdictional prerequisites for compelling arbitration under the Convention was satisfied here: there existed a written contract to arbitrate; the agreement provided for arbitration in the territory of a signatory to the Convention; the agreement arose out of a legal commercial relationship; and a party to the agreement was not a United State citizen. *See id.* at 30a-35a; *Bautista*, 396 F.3d at 1294 n.7. The District Court also found that none of the Convention's available affirmative defenses forbade arbitration; Thomas could not show that the arbitration contract was "null and void, inoperative or incapable of being performed." *Id.* at 35a; *see Bautista*, 396 F.3d at 1301. The court accordingly issued an order compelling arbitration, denied as moot Thomas's motion to remand his claims to Florida state court, and closed the case. *Id.* at 35a.

Thomas appealed. The Eleventh Circuit reversed. App. 1a-24a.

The court of appeals first concluded that certain of Thomas's claims were not subject to arbitration because they arose prior to the October 2005

execution of the Seafarer's Agreement containing the arbitration clause, and the clause did not apply retroactively. App. 8a-12a.

The court next concluded that Thomas's Wage Act claim for payments owing after his discharge *was* presumptively subject to the arbitration clause, *id.* at 12a—but the clause was "null and void" under Article V of the Convention as against public policy. *Id.* at 22a. The reason: The arbitration clause specified that the proceeding would be subject to Panamanian law.

Citing dicta in a footnote in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) and later repeated with attribution (and also in dicta) in *Vimar Seguros y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), the court of appeals concluded that an arbitration proceeding governed by another nation's law would bar Thomas from relying on a U.S. statutorily created cause of action. App. 22a. Nor, in the panel's view, was there sufficient assurance of post-arbitration review of any arbitral award resulting from Thomas's Wage Act claim. If Thomas "receive[d] no award in the arbitral forum," the court opined, Thomas would have "nothing to enforce in U.S. courts, which will be deprived of any later opportunity to review." *Id.*

The court of appeals did not explain in its treatment of the purported "public policy" failings of the parties' arbitration clause how Article V of the Convention—which governs when arbitral *awards* may be refused, *see* App. 45a—could operate to bar application of a mandatory arbitration *agreement* between two parties subject to the Convention's terms. And the court also reached its "public policy"

holding without examining what substantive remedies might be available—or unavailable—to Thomas under Panamanian law.[5]

Carnival sought rehearing *en banc*, observing that the panel's ruling had placed the circuit in conflict with Supreme Court and circuit court precedent presuming the validity of arbitration clauses like the one invoked here. Rehearing was denied. App. 37a.

REASONS FOR GRANTING THE WRIT

This Court's precedents—and those of the other federal courts of appeal—consistently favor enforcement of international arbitration agreements, including those requiring arbitration in foreign courts or under foreign law. The Eleventh Circuit's reasoning in this case, however, took a quite contrary approach: it approached the parties' mandatory arbitration contract with a presumption of the *invalidity* of an agreement to arbitrate under foreign law, and declared the mere fact that foreign law governed an arbitration to be disqualifying as a matter of American public policy. The panel's decision is sweeping in both its reasoning and application, and it has the potential to affect any international arbitration agreement requiring application of foreign law within the courts of that circuit. Review is warranted.

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[5] The Eleventh Circuit's failure to examine the substance of Panamanian law is perhaps explained by Thomas's failure to raise the issue before the trial court. Respondent's waiver, however, did not give the panel pause.

I. THE COURT SHOULD GRANT REVIEW TO SETTLE WHETHER AN OTHERWISE ENFORCEABLE INTERNATIONAL AGREEMENT TO ARBITRATE UNDER FOREIGN LAW IS PER SE INVALID AS TO A UNITED STATES STATUTORY CLAIM.

A. This Court's Precedents Instruct Courts Assessing Foreign Arbitration Clauses To Honor The Parties' Contracts In All But Extraordinary Instances.

In *M/S Bremen* v. *Zapata Off-Shore Co.* (hereinafter "*The Bremen*"), this Court vacated and remanded a Fifth Circuit judgment declining to enforce an English forum-selection clause in an international towage contract between an American corporation and a German corporation. 407 U.S. 1, 2 (1972). This Court held that a forum selection clause should be enforced unless enforcement would be unreasonable and unjust, or where the clause is invalid for reasons such as fraud or overreaching. *Id.* at 15.

Two years later, in *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506 (1974), this Court extended *The Bremen*'s holding to international agreements to arbitrate. The contract in *Scherk*—between an American company and a German citizen—required arbitration in Paris under United States law. This Court held the parties' agreement valid and enforceable as to a 1934 Securities Exchange Act claim. *Id.* at 513. Explaining that an agreement to arbitrate is, in effect, "a specialized kind of forum-selection clause," the Court instructed that such agreements should not be repudiated under a " 'parochial concept that all disputes must be

resolved under our laws and in our courts.'." *Scherk*, 417 U.S. at 519 (quoting *The Bremen*, 407 U.S. at 9). To repudiate foreign arbitration clauses too lightly, this Court reasoned, would essentially prevent the development of international trade and commerce in world markets—an effect specifically proscribed by the Convention. *See Scherk*, 417 U.S. at 519-520 n.15; *see also Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991) (applying *The Bremen* to enforce forum selection clause in passage contract designating courts in Florida as the agreed-upon fora for dispute resolution).

The above decisions indicate a strong presumption in favor of enforcing international agreements to arbitrate. The Eleventh Circuit's ruling in this case, however, reflects an undesirable retrenchment from this Court's decisions—a retrenchment based on dicta in a single footnote in a decision from this Court. *Mitsubishi*, 473 U.S. at 636 n.19.

Mitsubishi relied on *The Bremen* and *Scherk* to require arbitration of a Sherman Antitrust Act claim based upon the strong presumption in favor of enforcing freely negotiated choice-of-forum provisions. *Mitsubishi*, 473 U.S. at 631, 636-637. In a footnote, this Court opined in dicta that it would have "little hesitation in condemning" a hypothetical arbitration agreement as against public policy "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations. *Id.* at 637 n.19.[6]

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[6] This Court has invoked *Mitsubishi* to hold that claims under the Carriage of Goods by Sea Act (COGSA) do not render null and void an agreement that requires arbitration in a foreign

The majority's comment identified the concern that an arbitral panel could potentially displace American law over an antitrust claim. That concern was mitigated in *Mitsubishi* by the parties' understanding that American law would govern in that case—as well as the recognition that a United States court could review and enforce, or decline to enforce, an arbitral tribunal's award under Article V(2)(b) of the Convention. *See Mitsubishi*, 473 U.S. at 637, 638. But the Eleventh Circuit extracted *Mitsubishi*'s aside from the footnote where it was offered and constructed a holding around it. The court precipitated a circuit split in the process, as we next discuss.

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forum and that might require application of foreign law. *Vimar*, 515 U S at 539. In its analysis, this Court identified the *Mitsubishi* dicta and considered whether application of foreign law would reduce liability below what COGSA guarantees—something COGSA specifically proscribes. *Id.* This Court again did not reach the merits of the question, however, because it was "not established what law the arbitrators [would] apply to petitioner's claims *or* that petitioner [would] receive diminished protection as a result." 515 U.S. at 540 (emphasis added). As this Court explained, the "mere speculation" that the foreign arbitrators might apply foreign law which might in turn "reduce respondents' legal obligations[] does not in and of itself lessen liability under COGSA." *Id.* at 541.

B. The Eleventh Circuit's Decision Conflicts With Those Of The Other Circuits To Have Addressed The Validity Of Arbitration Agreements Containing Foreign Choice-Of-Law Provisions.

A great majority of circuit courts—including even the Eleventh Circuit, in an earlier ruling now overtaken by *Thomas*—have concluded that choice-of-forum and choice-of-law clauses in international agreements are enforceable even when remedies available in a foreign forum are less favorable than those available in domestic courts. *See Lim* v. *Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005); *Haynsworth* v. *The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997); *Allen* v. *Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell* v. *R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229-30 (6th Cir. 1995); *Bonny* v. *Society of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993); *Roby* v. *Corp. of Lloyd's*, 996 F.2d 1353, 1362-63 (2d Cir. 1993); *Riley* v. *Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992); *see also Lipcon* v. *Underwriters at Lloyd's London*, 148 F.3d 1285 (11th Cir. 1998). These decisions all hold that a choice-of-law or choice-of-forum provision is not fundamentally unfair simply because it provides different remedies than those available in the United States; such a provision is fundamentally unfair only where it deprives the claimant of any remedy. *See, e.g.*, *Bonny*, 3 F.3d at 162; *Roby*, 996 F.2d at 1363; *Riley*, 969 F.2d at 953.

In *Riley*, for example, an American citizen filed suit against Lloyd's of London in federal district court alleging violations of the Securities Act of 1933 and seeking to invalidate an agreement to arbitrate in

London and under English law. 969 F.2d at 956. The district court enforced the arbitration provision; the Tenth Circuit Court affirmed. Applying *The Bremen*, the court of appeals observed that forum selection clauses are "prima facie valid", and that "[o]nly a showing of inconvenience so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice, would be sufficient to defeat a contractual forum selection clause." Id. at 957-958. The court expressly rejected Riley's argument, based on the *Mitsubishi* dicta, that arbitration in a London forum under English law would combine to eliminate his substantive rights under the federal securities laws. *See id.* at 957. As that court explained, "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided the law of the chosen forum is not inherently unfair." *Id.* at 958.

The *Riley* court also observed that "the policy of signatory nations to the Convention * * * presumes the enforceability of arbitration agreements." *Id.* at 960. As the court explained, the "null and void" exception of Article II is narrowly applied—and backstopped by the post-arbitral relief afforded by Article V of the Convention "when enforcement of an award in violation of public policy is sought." *Id.* at 959-960.

The Second Circuit followed the Tenth Circuit Court's lead in a case involving similar facts. *See Roby*, 996 F.2d 1353. Noting the unique concerns addressed by United States securities laws—and that they resembled to that degree the antitrust

statutes at issue in *Mitsubishi*—the court of appeals addressed head-on whether the "public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors." *Roby*, 996 F.2d at 1364. But the Second Circuit nonetheless rejected the plaintiffs' *Mitsubishi* dicta-based argument: "It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement." *Id.* at 1360. As the court explained,

> A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. [*Id.*]

As had the *Riley* court, the *Roby* court examined the remedies available under English laws and applied the analysis in *The Bremen* to conclude that the plaintiffs had not overcome the presumption of the clauses' validity. *See id.* at 1363. The *Roby* court emphasized that "it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States"; instead, plaintiffs seeking to avoid application of their contract must establish that they "will be deprived of any remedy or treated unfairly" to escape their contractual obligations. *Id.* (internal quotation omitted). The *Roby* plaintiffs had argued that requiring their

claims to be arbitrated under English law would eliminate their United States statutory remedies. The court of appeals took that concern seriously, *see id.* at 1364-65; but it nevertheless determined that the plaintiffs had failed to meet *The Bremen*'s high burden for invalidating the forum and law selection clauses because English law supplied ample remedies. *Id.*

The Fourth, Fifth, Sixth, and Seventh Circuit courts of appeals have applied *Riley* and *Roby*'s reasoning to similar facts to determine that English law afforded sufficient remedies to vindicate the plaintiffs' substantive rights. *See Haynsworth*, 121 F.3d at 969-970; *Bonny*, 3 F.3d at 161; *Allen*, 94 F.3d at 930; *Shell*, 55 F.3d at 1231; *see also Fireman's Fund Ins. Co.* v. *M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1997) (compelling international arbitration of COGSA claim based on evidence that Korean law would be at least as favorable as U.S. law). In each case, the circuit courts determined that a foreign nation's law afforded sufficient remedies. And in each case, the circuit courts implicitly rejected the *Mitsubishi* dicta that a foreign choice-of-law provision in an arbitration agreement doomed the agreement as against public policy. Sometimes that implicit rejection was explicit as well: The Fifth Circuit in *Haynsworth*, for example, addressed and dismissed the *Mitsubishi* dicta, reasoning that the statement was limited to an interpretation of antitrust laws. *Haynsworth*, 121 F.3d at 968.

The Eleventh Circuit cited to none of these decisions—not one—in reaching the result challenged here. Indeed, the court of appeals cast aside not only the concerted holdings of its sister

circuits, but an earlier holding of its own. In *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1998), the court of appeals held that enforcing an arbitration agreement under the Convention was appropriate even where it prevented the plaintiff there from bringing claims under United States statutes. As the court of appeals explained, "[w]e will not invalidate choice clauses * * * simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States." *Id.* at 1297. That, of course, is precisely what the Eleventh Circuit did here—and it did so on the bare assumption that the foreign national law governing Thomas's claims would provide him something less than the full relief he might obtain in a United States court.

When they analyzed whether a contract requiring arbitration under foreign law violates public policy when a United States statutory claim is at issue, the Second, Fourth, Fifth, Sixth, Seventh, and Tenth (and, before now, Eleventh) Circuits correctly applied this Court's precedents. They presumed the validity of an agreement to arbitrate under foreign law and held that to invalidate such an agreement, a substantial showing that the foreign law is unreasonable and against public policy must be made. The Eleventh Circuit in this case went against all of these fundamental teachings. It presumed a foreign choice-of-law clause invalid. It failed to examine the substance of the law sought to be applied. It failed to hold respondent Thomas to the substantial burden imposed on one seeking to avoid application of a contract. It rigidly applied dicta in one case to overcome the consistent holdings of many others. And in the process, the court of

appeals threw itself into disagreement with the several other circuits to have addressed and resolved the question presented here. Certiorari should be granted.

II. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION.

A. The Eleventh Circuit's Ruling Rests On A New And Erroneous Interpretation Of The Convention.

Article II of the Convention governs the enforceability of arbitration agreements. Under that Article, "unless there is an affirmative defense that prevents the application of the Convention Act, the Court should compel the parties to arbitrate," as long as certain jurisdictional prerequisites are met. *See* App. 44a; *Bautista*, 396 F.3d at 1301-02. Article II(3) provides affirmative defenses to arbitrability; it exempts from enforcement agreements to arbitrate that are "null and void, inoperative or incapable of being performed." App. 44a. The limited scope of Article II's "null and void" clause encompasses only those situations, such as fraud, mistake, duress, and waiver that can be applied neutrally on an international scale. *See Bautista*, 396 F.3d at 1302; *see also DiMercurio* v. *Sphere Drake Ins., PLC*, 202 F.3d 71, 79 (1st Cir. 2000) (noting that the "few grounds listed to invalidate arbitration clauses" under the Convention's "null and void" clause are limited to "standard breach-of-contract defenses"); Article II says nothing about "public policy." And for good reason: As the First Circuit observed long ago, "by according to and implementing the [Convention], the federal government has insisted that not even the parochial interests of the nation may be the

measure of interpretation." *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982).

Article V, on the other hand, allows a country to "refuse recognition and enforcement of an [arbitral] award if 'recognition or enforcement of the award would be contrary to the public policy of that country.'" *Scherk*, 417 U.S. at 519 n.14 (quoting Article V(2)(b)).

The Eleventh Circuit commingled these two Articles, to demonstrably ill effect. The court applied Article V's "public policy" exception to enforcement of arbitral *awards* to prospectively void an arbitration *agreement*, despite Article II's express delineation of the circumstances in which such agreements may be voided ("public policy" not among them). The court of appeals' approach already has commentators opining on its significance in international arbitration. *See, e.g.*, Joseph R. Brubaker, *The Prospective Waiver of a Statutory Claim Invalidates an Arbitration Clause: The Eleventh Circuit Decision in* Thomas v. Carnival Corp., 19 Am. Rev. Int'l Arb. 309 (Nov. 2009). The Eleventh Circuit's suggestion, unfettered by any inquiry into the substance of the arbitration process under another nation's law, that arbitration awards not yet awarded are per se invalid as against American "public policy" contravenes the Convention's letter and its purpose in one fell swoop. Review is warranted to define the scope and extent of the Convention over international agreements to arbitrate under foreign law when applied to a U.S. statute.

B. The Eleventh Circuit's Ruling Has Introduced Needless And Potentially Costly Uncertainty Into The Maritime Arbitration Context.

Thomas holds that agreements to arbitrate under foreign law are presumptively invalid when a United States statutory claim is pled. The precedent this decision has set is at odds with this Court's precedents and with all of the other circuits that have addressed the issue, and serves to unsettle the law in an area that demands uniformity. *See Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 28 (2004) ("our touchstone is a concern for the uniform meaning of maritime contracts").

The *Thomas* opinion is a stone thrown in calm waters. Under *Thomas*, any agreement to arbitrate under foreign law is subject to per se invalidation based on an unsubstantiated assertion that it violates a public policy under a particular United States statute. The turbulence created by *Thomas* will cause uncertainty in business dealings, undermine international comity, and impose trade impediments in a circuit that sees regular litigation over arbitration clauses and awards governed by the Convention. *See, e.g., Four Seasons Hotels and Resorts, B.V.* v. *Consorcio Barr, S.A.*, 533 F.3d 1349 (11th Cir. 2008); *Bautista*, 396 F.3d at 1292 (addressing ten consolidated cases); *Indus. Risk Insurers* v. *M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998). In the wake of the *Thomas* opinion, plaintiffs with the option to pursue litigation in the Eleventh Circuit court system surely will gravitate there, knowing as they do after this opinion that any arbitration agreement containing a

foreign choice-of-law provision will be declared void as against American "public policy."

This is not a tolerable state of affairs. The use of arbitration clauses in international contracts is widespread and growing. When international parties enter into an agreement to arbitrate, they prospectively determine the applicable forum to avoid costly litigation and forum shopping. Save in very limited circumstances, courts must give effect to choice-of-law provisions to respect party autonomy and to allow parties to define their legal rights and obligations. It is that autonomy that provides a predictable atmosphere and that allows for the smooth operation of international business transactions. *See* Robert Wai, *Transnational Liftoff and Jurisdictional Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 Colum. J. Transnat'l L. 209, 224-225 (2002); Philip J. McConnaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 Colum. J. Transnat'l L. 595, 610-611 (2001). "These virtually indispensable benefits of autonomy in international contracts, of course, do not arise simply out of the parties' contractual designations. The contractual selection of a single applicable law would provide little in the way of certainty and benefit if circumvention were possible by filing suit in a forum that refused recognition of the selection." McConnaughay, 39 Colum. J. Transnat'l L. at 611.

Non-existent or uneven application of rules undermines the force and effect of international commercial agreements—particularly in the maritime context. *See, e.g.*, *Norfolk S. Ry.*, 543 U.S.

at 28; *see also Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 210 (1996) ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision"). The Eleventh Circuit's opinion has unsettled the relative uniformity of the issue at bar and illuminated the existing confusion among the circuit courts regarding the proper scope and application of *Mitsubishi's* footnote. Before *Thomas*, developing case law presumptively favored the enforcement of international agreements to arbitrate under foreign law. After *Thomas*, courts will apply the Convention itself to invalidate international agreements to arbitrate under the guise of public policy simply because they call for application of foreign law.

The Eleventh Circuit's refusal to enforce the arbitration agreement invites "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 517. It also allows solemn promises to be defeated by artful pleading, as parties seeking to avoid their arbitration commitments need only append United States statutory claims to their complaints. *See Roby*, 996 F.2d at 1360. And it promotes forum-shopping by encouraging parties to file their claims in the Eleventh Circuit to improve their chances of defeating arbitration under a foreign choice-of-law provision.

The Eleventh Circuit Court's decision will cause confusion among courts confronted with the competing policies favoring the enforcement of domestic laws and contractual arbitration provisions that call for the application of foreign law. That

confusion within the Eleventh Circuit alone (not to mention the possibility that the court's reasoning will spread) may deter the very formation of international agreements. This Court should step in now, to forestall the uncertainty and confusion that has plagued the courts of appeals since the *Mitsubishi* dicta and that has now come to a head in *Thomas*.

"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen*, 407 U.S. at 8-9. Nor can we demand "trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts." *Id.* Parties to an international transaction should be free to select a forum for the resolution of potential disputes, save for all but the most extraordinary circumstances. The mere choice of another nation's law to govern a foreign arbitration is not an extraordinary circumstance justifying negation of a contract. The *Thomas* opinion should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

CATHERINE E. STETSON
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491

CURTIS J. MASE*
VALENTINA TEJERA
MASE, LARA, EVERSOLE, P.A.
80 S.W. 8th Street
Suite 2700
Miami, Florida 33130
(305) 377-3770

* Counsel of Record

Counsel for Petitioner

APPENDICES

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-10613

D. C. Docket No. 07-21867-CV-JAL

[Filed July 1, 2009]

PULIYURUMPIL MATHEW THOMAS,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Lines Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 1, 2009)

Before BARKETT and FAY, Circuit Judges, and TRAGER,* District Judge.

PER CURIAM:

Puliyurumpil Mathew Thomas appeals the district court's Order granting Carnival Corporation's Motion to Compel Arbitration and the Order denying his Motion to Remand this case to state court. Thomas originally brought suit against Carnival, his former employer which operated cruise lines in Florida waters, in Florida state court for damages arising from injuries he sustained in a slip-and-fall onboard a Carnival ship. He sued for negligence under the Jones Act (Count I),[1] unseaworthiness of the ship and failure to provide prompt and adequate maintenance and cure[2] under general maritime law

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* Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

[1] The Jones Act confers on seamen the statutory right to sue their employers in an American court for the negligence of fellow crew members. 46 U.S.C. § 30104.

[2] "Maintenance and cure" is an ancient common-law maritime remedy for seamen who are injured while in the service of a vessel. Our circuit has described the action as follows:

> The seaman's action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seaman receives a maintenance remedy, because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to the maximum cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.

of the United States (Counts II and III), and failure to pay wages under the Seaman's Wage Act (Count IV).[3]

Relying on the arbitration clause of its most recent Seafarer's Agreement with Thomas in conjunction with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), Carnival filed to remove the suit to federal court and have the district court compel the parties to arbitrate. The district court granted these motions, finding that the Convention applied and that the arbitration provision of the Seafarer's Agreement was enforceable.

Thomas appeals this decision and argues that it should be reversed on several grounds. First, Thomas argues that the Convention does not apply in this case because two of its four jurisdictional prerequisites have not been met. Specifically, he argues that the requirement that any agreement to arbitrate must be in writing was not met because the governing Seafarer's Agreement at the time of his injuries did not contain an arbitration clause. As to the Convention's provision that it only applies to commercial contracts, he argues that seamen employment contracts are not considered commercial contracts.

Flores v. *Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995).

[3] The Seaman's Wage Act, inter alia, focuses on ensuring prompt wage payment to seaman via a treble-damages wage-penalty provision assessed on employers for late wages. 46 U.S.C. § 10313.

Alternatively, Thomas notes that even if all of the jurisdictional requirements are met, the Convention provides that courts need not enforce an arbitration clause when to do so "would be contrary to the public policy of that country." Thomas invokes this affirmative defense, arguing that forcing him to arbitrate in a forum that would apply non-U.S. law constitutes a prospective waiver of his U.S. statutory rights and, thus, the Arbitration Clause violates U.S. public policy.

Finally, Thomas argues that his statutory claims (based on the Seaman's Wage Act and Jones Act) are outside the scope of the Convention. He asserts that both statutes are at odds with the Convention and, as more recently passed and amended statutes, they supersede all prior inconsistent treaties including the Convention.

BACKGROUND

Thomas was employed by Carnival as a head waiter on one of its cruise ships, the Imagination, which flew a Panamanian flag of convenience.[4] On November 8, 2004, Thomas slipped and fell on a wet substance in the dining room, dropping a coffeepot. He injured his spine and right shoulder and burned his leg. The Seafarer's Agreement in effect at that time did not contain any arbitration provision (the "Old Agreement"). Thomas received what he alleged

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[4] A ship uses a flag of convenience when the nationality of the ship's owner is different from the country of registration of the ship. The ship flies a flag of convenience to show the country of registration, which determines the laws under which the ship is required to operate and to be applied in relevant admiralty cases.

was substandard medical care from the onboard physician, who only addressed the leg burn. Due to the injuries, he was signed off the vessel soon after, but on regular vacation time rather than medical leave. During this period, he was not given any maintenance or cure payments, nor was he treated for his neck and shoulder injuries. In January of 2005, Thomas again signed on to the Imagination. Over the course of the next several months, Thomas repeatedly visited the shipboard physician where he claims that he (1) initially was told that he did not have injuries; (2) later was treated only with analgesic balm and pain killers; and (3) eventually was signed off the vessel, again due to injuries and again on regular vacation leave. Before being signed off from the ship, there were many days Thomas could not properly execute his duties because of his shoulder and neck pain, and he consequently lost pay.

On October 10, 2005, Thomas again returned to the Imagination and executed a new Seafarer's Agreement with Carnival that did contain an arbitration clause (the "New Agreement"), which specified that any disputes would be arbitrated in the Philippines and resolved under Panamanian law. Just over two months later, in December of 2005, the shipboard physician determined that Thomas's previous injuries from 2004 rendered him unfit for continuing with his duties, and he was officially discharged for good. Thomas was given a medical sign-off with a $700 payment and commenced receiving medical treatment. After his medical sign-off, he received maintenance and cure payments for approximately three months, but those ceased in April of 2006.

DISCUSSION

I. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is a multi-lateral treaty that requires courts of a nation state to give effect to private agreements to arbitrate and to enforce arbitration awards made in other contracting states.[5] The United States, as a signatory to the Convention, enforces this treaty through Chapter 2 of the U.S. Federal Arbitration Act (FAA), which incorporates the terms of the Convention (the "Convention Act").[6]

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[5] The Convention was adopted by a United Nations diplomatic conference on June 10, 1958 and entered into force on June 7, 1959. It was signed by the President of the United States and ratified by Congress in 1970. As of January 2009, there were 144 parties to the Convention—142 of the 192 United Nations Member States, the Holy See and the Cook Islands (a New Zealand Dependent Territory).

[6] *See* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the defendant or defendants may, at anytime before the trial thereof, remove such action or proceeding to the district court * * * where the action or proceeding is pending."); 9 U.S.C. § 206 ("A court having jurisdiction under this chapter [9 USCS §§ 201 et seq.] may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.")

We review de novo a district court's order to compel arbitration pursuant to the Convention Act. *Bautista* v. *Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005). Unless there is an affirmative defense that prevents the application of the Convention Act, the Court should compel the parties to arbitrate, providing the following jurisdictional prerequisites are met:

> (1) there is an agreement in writing to arbitrate the dispute;
> (2) the agreement provides for arbitration in the territory of a signatory of the Convention;
> (3) the agreement arises out of a legal relationship, whether contractual or not, that is considered commercial; and
> (4) one party to the agreement is not a United States citizen, *or* the commercial relationship at issue has some reasonable relation with a foreign state.

Id. at 1294–95.

There is no dispute that the second and fourth jurisdictional prerequisites of the Convention have been met. Accordingly, we first consider Thomas's argument that the first and third jurisdictional prerequisites have not been met and then consider his affirmative defenses.

II. Jurisdictional Prerequisites of the Convention

A. The agreement must arise out of a commercial legal relationship.

Thomas argues that seaman employment contracts are *not* commercial contracts and therefore are

expressly exempt from arbitration under the Convention. However, as Thomas has acknowledged, we have previously held that seaman employment contracts *are* commercial. *Bautista*, 396 F.3d at 1295–96. While Thomas submits that this decision was wrong and should be reconsidered, we are bound by our prior precedent. Accordingly, we find that this jurisdictional requirement is met.

B. There must be an agreement in writing to arbitrate the dispute.

Thomas also argues that there is no agreement to arbitrate this dispute, in writing or otherwise, because the injuries that gave rise to all of his claims occurred before the New Agreement containing the Arbitration Clause was executed. In the alternative he argues that, even if some of the claims are subject to the Arbitration Clause, the court erred in ordering arbitration of *all* his claims, which included those clearly arising out of his first term of employment while his Old Agreement was in effect. Carnival responds that the Arbitration Clause governs because the suit was brought after the New Agreement was signed. Carnival also suggests that the Arbitration Clause is retroactive.

The Arbitration Clause at issue provides that:

> "Any and all disputes *arising out of or in connection with this Agreement*, including * * * Seafarer's service on this vessel shall be referred to, and finally resolved by arbitration * * * ."

(emphasis added). The effective date of this provision stated that:

> "[T]he employment relations between [the parties] shall be governed by the terms of this Agreement commencing on the date the Seafarer first signs on board the assigned vessel after signing this Agreement [October 10, 2005] and continuing for a period of time which shall not exceed a maximum service period of 10 months."

Thomas brought four claims: (1) Carnival was negligent both in causing the accident resulting in his injuries and its immediate medical response; (2) the vessel was unseaworthy at the time of the accident; (3) he did not receive the amount of maintenance and cure due to him from his injury; (4) he has not received all the wage payments due to him from his employment.

The district court ordered arbitration, noting that "Plaintiff's claims all arise out of his employment on the Imagination" and interpreting the New Agreement to require arbitration of "all disputes arising out of Plaintiff's services on the vessel." We believe the district court erred in this analysis. There is no doubt that Thomas's claims arose out of his employment on the Imagination, but the relevant question is whether they arose "out of or in connection with this [New] Agreement," as set forth in the Arbitration Clause. It is not enough that the dispute simply arose from his work on the Imagination, or arose after the New Agreement was signed, for that matter. The disputes must have some actual relation to the New Agreement,

irrespective of what ship the claims originated from and when suit was brought.

As is clear from the face of Thomas's original complaint, his claim of negligence under the Jones Act (Count I) and unseaworthiness (Count II) are allegations that involve only the events stemming from the slip-and-fall in 2004—prior to the existence of, and with no connection to, the New Agreement. He could have brought the exact same negligence and unseaworthiness claims had he never executed the New Agreement or signed back on to the Imagination. In fact, had Thomas signed on to any vessel other than the Imagination under an agreement with similar terms as the New Agreement, it would be patently clear that the Arbitration Clause—with its language referring to disputes arising from "this vessel"—would *not* apply to his negligence and unseaworthiness claims originating from the Imagination.

As to the maintenance and cure claim (Count III), the issue is slightly more complicated. Initially the claim clearly had no connection to the New Agreement because Thomas was owed maintenance and cure from the moment of his injury. However, the fact that he attempted to return to work multiple times, the last attempt of which was governed by the New Agreement, requires further analysis. Specifically, we must address whether his return to work at any point either (1) terminated Carnival's maintenance and cure obligations or (2) created multiple maintenance and cure claims governed by different Seafarer's Agreements. We believe it did neither.

In ascertaining the extent of the coverage of this claim, we have held that the touchstone inquiry to determine if an obligation has been terminated is whether the seaman has recovered to a "pre-accident condition." *See Brown* v. *Aggie & Millie, Inc.*, 485 F.2d 1293, 1296 (5th Cir. 1973) ("Federal maritime law does not require an injured seaman to forfeit payments of either maintenance or cure if there remains a reasonable possibility that further treatment will aid in restoring him to his pre-accident condition.").[7] We have subsequently explicitly ruled that "the cut-off point for maintenance and cure is not that at which the seaman recovers sufficiently to return to his old job but rather the time of maximum possible cure." *Lirette* v. *K & B Boat Rentals, Inc.*, 579 F.2d 968, 969 (5th Cir. 1978). From this record, it does not appear that Thomas has reached maximum possible cure. The fact that Thomas (unsuccessfully) attempted to return to work during his employment or signed a new contract has no bearing on his pre-existing maintenance and cure claim arising from his initial injuries; it did not terminate Carnival's existing obligations nor did it create multiple claims. Accordingly, the maintenance and cure claim does not "arise out of or in connection with the [New] Agreement."

As to the Seaman's Wage Act claim (Count IV), the issue is the closest. This act, inter alia, provides that seamen are entitled to the balance of their wages by

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[7] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

the earlier of twenty-four hours after the cargo has been discharged or four days after the seaman himself has been discharged. 46 U.S.C. § 10313(f). Based on the briefs, it is unclear from what period of employment Thomas claims he is owed. If it is for his employment term on the ship before October 10, 2005—which is governed by the Old Agreement—then this also does not "arise out of or in connection with the [New] Agreement." However, to the extent he claims wages for any period of time that occurred *after* the New Agreement was signed, that aspect of the claim may be covered under arbitration. Unlike the other claims, such a component would fairly be said to be "in connection with" the New Agreement because Thomas would not have been entitled to any further wages *but for* signing this contract.

Thus, no claim but this last meets the writing requirement of the Convention, unless, as Carnival argues, the arbitration clause is retroactive. However, we find that the New Agreement was not intended to be retroactive such that it supersedes any previous agreements. In contract interpretation, we can glean intent not only from what *is* said but what *is not* said. The New Agreement, which was quite thorough, notably did *not* specify that "disputes arising out of or in connection with this *or any previous* Agreement, including * * * Seafarer's service on this vessel shall be referred to, and finally resolved by arbitration." We think if the parties had intended retroactivity, they would have explicitly said so. *See, e.g.*, *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 106 (3d Cir. 2000) ("Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court,

there should be an express, unequivocal agreement to that effect.").[8]

Reading the contract on its face, as we must, we are required to separate Thomas's claims into those that "arise out of or in connection with the [New] Agreement" and those that do not. Although it would be more efficient to try all claims together, the Supreme Court has stated that efficiency does not trump resolution in the proper forum: "[The] Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 217 (1985). The corollary is that a court cannot shoehorn pendent *non-arbitrable* claims into arbitration based on "its own views of economy and efficiency." *Id.* Because the Jones Act negligence claim, the unseaworthiness claim, the maintenance and cure claim, and part of the Seaman's Wage Act claim (as it pertains to any obligations incurred before October 10, 2005) do not fall under the Convention, they are eligible to be litigated. Accordingly, the district court erred in compelling arbitration as to those claims.

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[8] The district court, as additional support for its decision, found that the Arbitration Clause was retroactive, citing to a case noting that "an arbitration agreement may be applied retroactively to transactions which occurred prior to execution of the arbitration agreement." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *King*, 804 F. Supp. 1512, 1514 (M.D. Fla. 1992). However, that case involved an arbitration agreement that "state[d] that it applies to all transactions 'whether entered into prior, on, or subsequent to the date hereof.'" That is, the agreement in that case explicitly stated it would be retroactive.

However, a claim for seaman's wages under Thomas's most recent term of employment *is* covered under the New Agreement. Thus, as to this portion of the claim, we must consider Thomas's affirmative defense under the Convention that the enforcement of the Arbitration Clause should be precluded as a violation of public policy.

III. Affirmative Defenses Under the Convention

Article V of the Convention provides specific affirmative defenses to a suit that seeks a court to compel arbitration including the following:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that * * * [t]he recognition or enforcement of the award would be contrary to the public policy of that country.

Article V (2)(b). Citing to Supreme Court precedent, Thomas argues that the Arbitration Clause, which forces him to resolve any disputes in an arbitral forum that must apply non-U.S. law, effectuates a waiver of his U.S. statutory rights in violation of public policy and, therefore, should not be enforced.[9] Both parties rely on the two cases from the Supreme Court that discuss the concerns expressed in this particular affirmative defense under the Convention.

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[9] Thomas also argues that he is barred from bringing his Jones Act claim, but we need not address this aspect of the argument as we have already held that it does not fall under the Arbitration Clause.

In *Mitsubishi Motor Corp.* v. *Soler Chrysler Plymouth, Inc.*, Mitsubishi, a Japanese car manufacturer, brought suit against its Puerto Rican distributor over a dispute related to their sales agreement and sought enforcement of the agreement's arbitration clause.[10] 473 U.S. 614 (1985). In the counterclaim, the Distributor included a count alleging Sherman Act violations. The Distributor sought to exempt this claim from the reach of the arbitration clause on the grounds that arbitration was not an appropriate forum for antitrust claims and the public interest in the statutory scheme of the Sherman Act would not be vindicated.[11] The court found that enforcing such an agreement in the international context would not violate U.S. public policy because the parties had agreed that American law would, in fact, be applied to the antitrust claims in the Japanese arbitration proceedings. The Court specifically noted that counsel for Mitsubishi conceded at oral argument that American law would apply to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. *Id.* at 637 n.19. Thus, U.S. statutory rights, while not being heard by a

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[10] The agreement at issue contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof.

[11] For support, the Distributor cited to a Second Circuit case that, in resolving a domestic arbitration dispute, distinguished between contractual and statutory rights and found that Sherman claims could never be arbitrated as they were an important part of the enforcement scheme of antitrust law. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968).

federal judge, were nonetheless not being ignored or violated but specifically protected:[12]

> To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that *the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law*, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Id. at 636–37 (emphasis added). The Court did, however, note that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

The agreement's choice of an arbitrable forum, by itself, is not a cause for concern. As the Supreme

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[12] Although the Distributor's claim was based on the Second Circuit's decision in *American Safety* rather than the affirmative defense provision of the Convention, the concerns relating to vindicating the public interest and policy of the United States are nonetheless similar.

Court said, statutory rights can be vindicated in arbitration as well as in court:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration[.]

Mitsubishi, 477 U.S. at 628.

The important question, however, is choice of law: What law will apply in that arbitral forum? As noted, in *Mitsubishi*, the party seeking to compel arbitration conceded that U.S. law would apply in the arbitration of the antitrust claims there. In this case, however, there is no such assurance in either the New Agreement or the representations of Carnival's counsel that U.S. law will apply. On the contrary, the New Agreement *explicitly states* that Panamanian law will apply.

The Supreme Court revisited the question of whether an international arbitration clause could violate U.S. public policy in *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*, which involved a dispute between a New York fruit distributor and a Japanese carrier. 515 U.S. 528 (1995). The Distributor had purchased oranges from a foreign supplier and contracted with the Carrier to transport them to the United States by cargo ship. The fruit arrived with significant damage and the Distributor

sued the Carrier to recover its losses. The Carrier moved to stay the action and to compel arbitration in Japan pursuant to the arbitration clause in the bill of lading in conjunction with the enforcement provisions of the FAA.[13] The Distributor argued that the arbitration clause was unenforceable under the FAA because, inter alia, it would violate the Carriage of Goods by Sea Act (COGSA)[14]—the U.S. enactment of the Hague Rules—and to compel arbitration would violate U.S. public policy. Specifically, it claimed that the foreign arbitrators would apply the Japanese enactment of the Hague Rules, which would significantly lessen the Carrier's liability in violation

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[13] A bill of lading is document issued by a carrier to a shipper, acknowledging that specified goods have been received on board as cargo for conveyance to a named place for delivery to the consignee who is usually identified. The form bill of lading at issue contained a clause which provided that (1) the contract evidenced by or contained in the bill of lading was governed by Japanese law, and (2) any dispute arising from the bill of lading was to be referred to arbitration in Tokyo, Japan, by the Tokyo Maritime Arbitration Commission.

[14] COGSA is a U.S. statute governing the rights and responsibilities between shippers of cargo and ship operators regarding ocean shipments to and from the United States. It is the U.S. enactment of the International Convention Regarding Bills of Lading, commonly known as the "Hague Rules." Congress, concerned that the Hague Rules did not offer shippers enough protection against damage to cargo by shipowners, amended the Hague Rules to increase the protection to cargo owners.

The central guarantee of § 3(8) of COGSA is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. Namely, any clause in a contract of carriage relieving or lessening the liability the liability of a carrier or ship for loss or damages arising from negligence, fault, or failure in the duties or obligations provided in § 3 is null and void and of no effect.

of "the central guarantee" of COGSA. *Id.* at 539. The Court noted that, "The relevant question, therefore, is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." *Id.* It then held,

> Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature. At this interlocutory stage *it is not established what law the arbitrators will apply to petitioner's claims* or that petitioner will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls.

Id. at 540.[15] The Court again noted, however, that "[w]ere there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a *prospective waiver* of a party's right to pursue *statutory remedies* * * *, we would have little hesitation in condemning the agreement as against public policy.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

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[15] The Supreme Court reaffirmed *Vimar's* emphasis on the procedural posture of the arbitration dispute in *PacifiCare Health Systems* v. *Book* when it upheld arbitration of a claim because, as in *Vimar*, it was "'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt." 538 U.S. 401, 407 (2003) (citing *Vimar*, 515 U.S. at 541).

Vimar presented a slightly different scenario than *Mitsubishi*. In the latter there was no doubt that American law would apply; in *Vimar*, although at the time of the appeal, it was unknown which country's laws would govern, it was possible that U.S. law might apply, and given that the proceedings were at an interlocutory stage, there would be another opportunity to review the case once the plaintiff sought enforcement of the award. In the case before us, however, it is undisputed that, regardless of the procedural posture of the case, U.S. law will never be applied in resolving the resolution of Thomas's claims.

The Court, then, has held that arbitration clauses should be upheld if it is evident that either U.S. law definitely will be applied or if, there is a possibility that it might apply *and* there will be later review. The arbitration clauses that provided the bases for these holdings are in direct contradistinction to the Arbitration Clause in the present case, which specifies ex ante that *only* foreign law would apply in arbitration. There is no uncertainty as to the governing law in these proposed arbitral proceedings—only Panamanian law will be applied. The New Agreement provides:

> This Agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer's service on the vessel *shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder.* The parties agree to this governing law, notwithstanding

> any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.

There is no dispute that the Imagination's flag of convenience is Panamanian nor that Thomas's Seaman's Wage Act claim is a U.S. statutory remedy. Thus, under the terms of the Arbitration Clause, Thomas must arbitrate in the Philippines (choice-of-forum) under the law of Panama (choice-of-law). As the arbitrator is bound to effectuate the intent of the parties irrespective of any public policy considerations, these arbitration requirements have "operated in tandem" to completely bar Thomas from relying on any U.S. statutorily-created causes of action. This inability to bring a Seaman's Wage Act claim certainly qualifies as a "prospective waiver" of rights, including one of a private litigant's "chief tools" of statutory enforcement—the Act's treble-damages wage penalty provision for late payments, *see, e.g., Mitsubishi*, 473 U.S. at 635 ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.").[16]

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[16] While the Supreme Court has not been confronted with an arbitration clause that would act as a prospective waiver, lower federal courts applying *Vimar* have. *See Central National-Gottesman, Inc.* v. *M.V. "Gertrude Oldendorff"*, 204 F. Supp. 2d 675, 679 (S.D.N.Y. 2002) ("The court is persuaded that the forum selection clause at issue here essentially operates as a prospective waiver of Gottesman's right to pursue statutory remedies under COGSA. If the case were decided in London instead of this district, there is a strong likelihood that English

Moreover, there is no assurance of an "opportunity for review" of Thomas's Seaman's Wage Act claim. Although we are at an interlocutory stage, the possibility of any later opportunity presupposes that arbitration will produce *some* award which the plaintiff can seek to enforce. But, in accordance with our holdings above, in this case Thomas would only be arbitrating a single issue—the Seaman's Wage Act claim, one derived solely from a U.S. statutory scheme. If, applying Panamanian law, Thomas receives no award in the arbitral forum—a distinct possibility given the U.S. based nature of his claim—he will have nothing to enforce in U.S. courts, which will be deprived of any later opportunity to review.

Despite our general deference to arbitration agreements in an era of international trade expansion, *see id.* at 638–39, the possibility of such a result would counsel against being deferential in this circumstance, as it is exactly the sort that the Supreme Court has described as a "prospective waiver of parties' rights to pursue statutory remedies" without the assurance of a "subsequent opportunity for review." *Vimar*, 515 U.S. at 540. The

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courts would give force to an exculpatory clause in the bill of lading, insulating parties other than the shipowner from liability, in violation of COGSA."); *Nippon Fire & Marine Ins. Co.* v. *M/V Spring Wave*, 92 F. Supp. 2d 574, 575 (E.D. La. 2000) ("[T]he Court finds that the [foreign forum selection] clause is unreasonable under the circumstances by violating the strong public policy against limiting liability in contravention of Section 1303(8) of COGSA."). *But cf. Fireman's Fund Ins. Co.* v. *Cho Yang Shipping Co.*, 131 F.3d 1336, 1340 (9th Cir. 1997) (compelling arbitration after finding "uncontroverted evidence that Korean law will be at least as favorable [to plaintiff] as COGSA").

Court explicitly stated that in such situations it "would have little hesitation in condemning the agreement as against public policy." *Id.* For the reasons expressed, we find the Arbitration Clause requiring arbitration in the Philippines under Panamanian law null and void as it relates to Thomas's Seaman's Wage Act Claim.[17]

IV. Conclusion

We reverse the district court's decision to compel arbitration as to all of Thomas's claims, as discussed above, and remand for further proceedings in accordance herewith.

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[17] Thomas also argued that the Seaman's Wage Act was categorically not subject to the Convention but rather was removed from its reach pursuant to *U.S. Bank* v. *Arguelles*, 400 U.S 351 (1971) (holding that the Labor Management Relations Act (LMRA) did not abrogate the Seaman's Wage Act remedy). In *Lobo* v. *Celebrity Cruises, Inc.*, we concluded otherwise and held that the Convention Act superseded the Seaman's Wage Act. 488 F.3d 891 (11th Cir. 2007) (noting that *Arguelles* was decided just after the Convention Act was passed such that the Court likely did not have the opportunity to consider the Convention, and finding that, unlike in the legislative history of the LMRA, it was clear that Congress did not intend to allow for broad industry-specific exceptions to the Convention Act).

Our opinion has no bearing on the holding of *Lobo*. We note that in *Lobo* the arbitration agreement stated the arbitral forum would be either Miami, FL or the seafarer's country of citizenship and did not specify that only foreign law would apply. More to the point, our decision today does *not* find that the Seaman's Wage Act supercedes the Convention Act or bars recognition of the Arbitration Clause. Rather, the narrow holding is that the Convention *does govern* but, applying its affirmative defenses provision, we find that *the particular arbitration clause in question* is null and void as a matter of public policy.

REVERSED and **REMANDED**

A True copy Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: */s/*
Deputy Clerk
Atlanta, Georgia

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10613

District Court Docket No.
07-21867-CV-JAL

[Filed July 1, 2009]

PULIYURUMPIL MATHEW THOMAS,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Lines Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 1, 2009
For the Court: Thomas K. Kahn, Clerk
By: Patch, Jeffrey

Issued as Mandate
SEP 10 2009
U.S. Court of Appeals
Atlanta, GA.

A True copy Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: */s/*
Deputy Clerk
Atlanta, Georgia

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-21867-CIV-LENARD/TORRES

[Filed January 4, 2008]

PULIYURUMPIL MATHEW THOMAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CARNIVAL CORPORATION d/b/a CARNIVAL CRUISE LINES, INC.,	)
	)
Defendant.	)

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION (D.E. 2); DENYING AS MOOT PLAINTIFF'S MOTION TO REMAND (D.E. 7); AND CLOSING CASE

THIS CAUSE is before the Court on Defendant's Motion to Compel Arbitration ("Motion," D.E.24), filed on July 19, 2007. Plaintiff filed a Response Opposing the Motion on August 31, 2007 ("Response," D.E. 36), and Defendant filed its reply

on September 12, 2007 ("Reply," D.E. 37).[1] Having thoroughly considered the Motion, the related pleadings, and the record, the Court finds as follows:

I. The Complaint

Plaintiff originally filed his Complaint (D.E. 1-1) in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida, but, on July 19, 2007, Defendant removed the action to this Court (*see* D.E. 1). In the Complaint, Plaintiff, who was working as a head waiter aboard Defendant's ship, the Imagination, alleges that he was injured when he slipped and fell on a wet substance in the dining room forward pantry while carrying a heavy bus pan of dirty dishes. (D.E. 1-1 at 10.) Specifically, Plaintiff alleges that he injured his spine and right shoulder in the fall, and that a coffeepot also spilled on him during the fall, burning his right leg. (*Id.*) Plaintiff further alleges that the shipboard physician ignored Plaintiff's neck and shoulder injuries and only treated him for the burn on his right leg. (*Id.*) Plaintiff alleges that he was not able to return to work due to the severity of his injuries, and that he was signed off by Defendant on regular vacation time, rather than medical leave, and was not given any maintenance or cure payments or treated in any way for his neck and shoulder injuries. (*Id.*) Plaintiff also alleges that in or around January 2005, he returned to work aboard the Imagination and, approximately one month later, began to experience pain again in his neck and shoulder, at which time

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[1] On July 26, 2007, after the instant Motion was filed, Plaintiff filed a Motion for Remand. (D.E. 7.)

he visited the shipboard physician, who "again told Plaintiff he did not have any injuries." (*Id.*)

The Complaint further details numerous instances between February 2005 and November 2005 in which Plaintiff visited and complained of shoulder and/or neck pain to the shipboard physician, who allegedly alternated between ignoring Plaintiff's injuries and treating Plaintiff for his injuries with pain killers, analgesic balm, local heat, physical therapy, and by ordering Plaintiff to remain off duty for certain periods of time. (*See id.* at 10-11.) On or about December 7, 2005, Plaintiff was ultimately found to be unfit for duties by the shipboard physician, and Plaintiff alleges that, on or about December 24, 2005, he was given medical sign off with $700.00 payment. (*Id.* at 10-12.)

Plaintiff visited a doctor at Defendant's request in his home country of India, and was diagnosed with chronic partial tear of right supraspinatus tendon, and degenerative disc disease of the cervical spine at multiple levels. (*Id.* at 12.) Subsequently, from about May 1, 2006 through June 30, 2006, Plaintiff e-mailed Defendant regarding allegedly insufficient and/or late maintenance and cure payments, and further notified Defendant that the payments were being sent to an area far away from his home, making it expensive and painful for him to pick up the payments. (*Id.* at 13.)

Based on these events, Plaintiff asserts claims for negligence and unseaworthiness under the Jones Act; for failure to provide prompt and adequate maintenance and cure under the general maritime law of the United States; and for failure to pay wages

under the Seaman's Wage Act, 46 U.S.C. Section 10313 (*Id.* at 13-18.)

II. The Notice of Removal

Defendant asserts that this action was properly removed pursuant to, *inter alia*, Title 9, United States Code, Section 205,[2] because the subject matter of the instant dispute relates to an arbitration agreement that falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), codified at Title 9, United States Code, Sections 201 *et seq.* (*See* D.E. 1.)

III. The Motion to Compel Arbitration

In its Motion, Defendant contends that, during the relevant period, Plaintiff and Defendant were parties to a Seafarer's Agreement (the "Agreement"), which provided for compulsory foreign arbitration of all claims arising out of that employment, and that, as a result, all of Plaintiff's claims are subject to arbitration. (D.E. 2 at 2.) Moreover, Defendant claims that the four jurisdictional prerequisites of the Convention have been met: there exists an agreement in writing to arbitrate the dispute; the agreement provides for arbitration in London, England, Monaco, Panama City, or Manila,

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[2] Section 205 provides: "Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards, Title 9, United States Code, Sections 201 *et seq.*], the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court...where the action or proceeding is pending."

Philippines, countries which are signatories of the Convention; the agreement to arbitrate arises out of a commercial legal relationship; and Plaintiff is not a citizen of the United States. (Id. at 5-6.) Therefore, Defendant maintains that the present dispute must be arbitrated pursuant to the terms of the arbitration clause of the Agreement. (*Id.* at 6.)

In his Response, Plaintiff asserts that 1) the arbitration clause cited by Defendant cannot serve as the basis to compel arbitration because it applies to a later period of employment that the one during which Plaintiff was injured and from which Plaintiff's causes of action arise, and because the clause is not retroactive; 2) seaman contracts are not commercial and are therefore exempt from arbitration; and 3) various defenses exist to forbid enforcement of the arbitration clause. (*See* D.E. 36.)

In its Reply, Defendant argues that the arbitration clause in the Agreement is applicable to all of Plaintiff's claims. First, Defendant asserts that Plaintiff's maintenance and cure count arose as of the date Plaintiff signed off from the vessel on medical leave, and is thus covered by the arbitration clause. (D.E. 37 at 1.) Second, Defendant asserts that Plaintiff's claim for failure to pay wages also arose after October 2005, and thus is also covered by the arbitration clause. (*Id.* at 2.) As to Plaintiff's claim for negligence under the Jones Act and claim for Unseaworthiness, Defendant asserts that these claims allege that Defendant failed to provide him with adequate medical care after the Agreement was executed, and that the failure to provide him with adequate medical care constitutes ongoing

misconduct that triggers the arbitration provision in the Agreement. (*Id.*)

IV. Discussion

In deciding a motion to compel arbitration, under the Convention, a court conducts a "very limited inquiry." *Bautista* v. *Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005) (citing *Francisco* v. *Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002)). Unless one of the Convention's affirmative defenses applies, the Court *must* order the parties to arbitrate if the following four jurisdictional prerequisites are met: (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, that is considered commercial; and (4) a party to the agreement is not a citizen of the United States, or the commercial relationship has some reasonable relationship with one or more foreign states. *Bautista*, 396 F.3d at 1294-95.

In its Motion, Defendant argues that each of these jurisdictional prerequisites are satisfied. First, Defendant contends, and Plaintiff appears to concede, that there is a written agreement to arbitrate; namely, the Agreement, which contains a provision pursuant to which the parties agreed to submit to arbitration "[a]ny and all disputes arising out of or in connection with this Agreement * * * or [Plaintiff's] service on the vessel." (D.E. 2 at 5.) Indeed, "[a]n arbitral clause in a contract * * * signed by the parties" constitutes an "agreement in writing" within the meaning of the Convention. *Bautista,* 396 F.3d

at 1300. Therefore, the Court finds that there exists an agreement in writing to arbitrate the present dispute.

Moreover, contrary to Plaintiff's position that the Agreement relates to "a completely different period of employment Plaintiff had with Defendant than the period of employment implicated by the causes of action in Plaintiff's Complaint" (D.E. 7 at 1),[3] the Court finds that, based on the broad language of the arbitration provision in the Agreement, the parties intended to arbitrate all claims arising from Plaintiff's employment on the Imagination as a result of entering into the Agreement. *See Gregory* v. *Electro-Mechanical Corp.*, 83 F.3d 382, 386 (11th Cir. 1996) (noting that any doubt concerning scope of arbitrable issues should be resolved in favor of arbitration); *Becker* v. *Davis*, 491 F.3d 1292, 1305 (11th Cir. 2007) ("federal policy requires us to construe arbitration clauses generously"). The arbitration clause in the Agreement, which was signed by the parties on October 10, 2005 (*see* D.E. 7 at 2), clearly states that the parties agreed to arbitrate *all* disputes arising out of Plaintiff's services on the vessel, and, as the Complaint makes clear, Plaintiff's claims all arise of out his employment on the Imagination. In addition, although Plaintiff argues that the Agreement is not applicable to his claims because his injury occurred nearly one year before the parties entered into the Agreement, the Court notes that the allegations in the Complaint are not limited to the period prior to October 10, 2005, and, in fact, Plaintiff's claims are

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[3] In his Response to the Motion, Plaintiff refers the Court to arguments made in his Motion for Remand. (*See* D.E. 36 at 1.)

in large part based upon allegations of Defendant's ongoing misconduct through June 30, 2006, months after the parties executed the Agreement. Thus, in line with the principle that the Convention "generally establishes a strong presumption in favor of arbitration of international commercial disputes," *Bautista*, 396 F.3d at 1295, and given the fact that courts have retroactively applied arbitration agreements to activities which occur prior to the execution of the arbitration agreement, *see, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, v. *King*, 804 F. Supp. 1512, 1514 (M.D. Fla. 1992), the Court finds that the scope of the Agreement and the arbitration provision contained therein includes all of Plaintiff's claims at issue in the Complaint.

As to the second prong of the Court's inquiry, at least one of the countries listed in the arbitration clause of the Agreement—the Philippines—is a signatory of the Convention. *See Bautista*, 396 F.3d at 1295 n.7. Moreover, Plaintiff does not dispute that the countries listed in the arbitration clause are signatories of the Convention.

As to the third prong of the Court's inquiry, Defendant avers that a seaman's employment contract, such as the Agreement at issue between Plaintiff and Defendant, constitutes a commercial legal agreement. (D.E. 2 at 5.) The Court agrees. *See Bautista*, 396 F.3d at 1295-1300 (examining similar employment contract and holding that the contract is a commercial legal agreement within the meaning of the Convention). Therefore, the Court concludes that the agreement to arbitrate between the parties in this case arises out of commercial legal agreement, as required by the Convention.

Finally, it is undisputed that Plaintiff's home country is India, and that he is *not* a citizen of the United States. (*See, e.g.*, D.E. 1-1 at 5; *see generally* D.E. 36.)

Having found that all four of the jurisdictional prerequisites of the Convention Act have been fulfilled, the Court will now turn to the issue of whether any affirmative defense to the Convention Act applies. In its Response, Plaintiff raises various arguments as to why enforcement of the arbitration provision in the Agreement is forbidden. Nonetheless, for the reasons discussed by the Eleventh Circuit in *Bautista*, the Court finds that Plaintiff has failed to establish that the agreement to arbitrate in this case is "null and void, inoperative or incapable of being performed." *See id.* at 1301. Therefore, the Court concludes that, under the facts of this case, it is obligated to compel arbitration, which shall occur in the manner and location described in the Agreement. *See Bautista*, 396 F.3d at 1294-95, 1303.

Accordingly, it is:

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Compel Arbitration (D.E. 2), filed on July 19, 2007, is **GRANTED**.
2. Plaintiff's Motion to Remand (D.E. 7), filed on July 26, 2007, is **DENIED as moot**.
3. All other pending motions not otherwise ruled upon are **DENIED as moot**.
4. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of January, 2008.

/s/ Joan A. Lenard
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Edwin G. Torres
All counsel of record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-10613-FF

[Filed September 2, 2009]

PULIYURUMPIL MATHEW THOMAS,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Lines Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT and FAY, Circuit Judges, and TRAGER*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

* Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX D

9 U.S.C. § 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [9 USCS §§ 201 et seq.].

9 U.S.C. § 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28 [28 USCS § 460]) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on

the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [9 USCS §§ 1 et seq.] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

46 U.S.C. § 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title [46 USCS § 10302] for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title [46 USCS § 11104]. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman–

(1) unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense, unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title [46 USCS § 10312], a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of

discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

APPENDIX E

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State my on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect

as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one

year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

* * *

APPENDIX F

SEAFARER'S AGREEMENT
CARNIVAL CRUISE LINES

The Application having been submitted by the Seafarer named below to Carnival Corporation doing business as Carnival Cruise Lines ("CCL"), and CCL having considered said Application, this Seafarer's Agreement is hereby entered by and between CCL and Seafarer, pursuant to the terms and conditions set forth below. Any other arrangements, agreements, or understandings regarding terms of employment are hereby canceled and superseded, and no amendment or exceptions to this provision are valid. Seafarer shall not rely upon any statements or representations, whether orally or in writing, contrary to the Seafarer's Agreement concerning wages, tips, and other terms and conditions of service. Nor shall Seafarer rely upon any representation, whether oral or in writing, contrary to the agreement that Seafarer's employment is at-will.

1. The Seafarer, **PULIYURUMPIL MATHEW THOMAS, CREW # 240515** agrees to work in the position of **TEAM HEADWAITER** aboard any assigned vessel operated by CCL or any of its affiliated companies, regardless of the class or location of the assigned vessel. CCL reserves the right to change the Seafarer's assigned position at any time without prior notice. Once a Seafarer has

been assigned to a vessel, he or she remains assigned to that vessel only, unless and until reassigned to a different vessel at CCL's sole discretion. CCL reserves the right to change the Seafarer's assigned vessel at any time without prior notice.

2. This Seafarer's Agreement shall be effective upon the Seafarer's reporting to work on an assigned vessel in navigation. The parties agree that the employment relations between them shall be governed by the terms of this Agreement commencing on the date the Seafarer first signs onboard the assigned vessel after signing this Agreement and continuing for a period of time which shall not exceed a maximum service period of 10 months. This Agreement shall automatically terminate without notice immediately upon Seafarer's unscheduled disembarkation of the assigned vessel if Seafarer disembarks the vessel for any reason, including but not limited to unscheduled personal leave, illness or injury, for more than 24 continuous hours. This Agreement shall also terminate without notice immediately upon Seafarer being unfit or unable to serve in his or her stated position at the commencement of a new voyage. If the Seafarer remains on the assigned vessel after the commencement of a new voyage, he or she would do so as an invitee and would no longer be considered a member of the vessel's crew. Seafarer's status as a member of the crew would not resume until the Seafarer actually returns to serving in his or her stated position. Further, this Agreement shall be suspended for any period of time that the assigned vessel is not in navigation, including but not limited to dry docks, lay ups for repairs/maintenance, or if the vessel is not yet commissioned. **Notwithstanding any other provision**

contained herein, this Seafarer's Agreement is terminable immediately at the will of either CCL or the Seafarer upon delivery or oral or written notice of termination or resignation.

3. A. Seafarer's right to receive any wages is conditioned upon his or her actual signing on as a member of the assigned vessel's crew and serving in his or her stated position while the vessel is in navigation.

3. B. Seafarer shall be paid the wage of $ 1.6071 USD for each day of work, including overtime. This daily rate translates to a monthly wage of $ 48.7500 USD. A week of work consists of 42 hours base time and 28 hours overtime, whether overtime is worked or not worked, for a total work week of 70 hours. The Seafarer shall also be paid vacation pay at the rate of one day per eleven days worked.

3. C. This subparagraph 3(C) shall not apply to any Seafarer who may receive gratuities or tips from passengers or other Seafarers. This subparagraph 3(C) also shall not apply to any Seafarer working in a management or Department Head capacity. Subject to these exceptions, extra overtime is time worked in excess of 70 hours per week according to CCL's records. Seafarer shall be paid $ N/A USD per hour for extra overtime worked, but it is understood and agreed Seafarer has no entitlement or right to work or to be assigned to work extra overtime, which is assigned at the discretion of CCL on an "as needed" basis. In the event Seafarer believes he or she has worked more hours than documented on Seafarer's or CCL's time records, or that any earned wages are due and owing, Seafarer must notify in writing his/her supervisor and his/her department head by

the end of the voyage on which the additional hours were worked. Additionally, the Seafarer must comply with the wage dispute procedures as set forth in the Acknowledgement and Verification of Wage Payment Form which must be completed by the Seafarer by the end of the subject voyage.

3. D. CCL makes no promise, guarantee or commitment, and Seafarer agrees he/she does not expect or anticipate payment by CCL, of any gratuity or tip compensation as wages under any circumstances. In the event a Seafarer who may receive tips by virtue of his/her position works under this Agreement during a period when the ship is out of regular service for any reason, such as in dry-dock, during a trans-oceanic crossing or involved in inaugural functions, or the Seafarer is working but is not aboard ship, he/she is to be paid at the rate of $ 35.00 USD for each day of work. In the event the wage outlined in this subparagraph is paid, all provisions of subparagraph 3.B above, except those contained in the first sentence, will still apply with force and effect.

3 E. If Seafarer becomes ill, injured, unfit, or unable to work during a voyage, his/her entitlement to un-earned wages shall extend only to the end of the voyage from which Seafarer signs off duty. In the event Seafarer is signed off duty due to illness or injury, CCL reserves the right to provide medical treatment aboard its vessel or ashore in either the vessel's home port, a regular port of call, or in Seafarer's home nation, at CCL's sole option, notwithstanding the automatic termination of this Agreement in such circumstances.

3. F. In the event Seafarer returns to work after this Agreement has automatically terminated pursuant to paragraph 2, then Seafarer's return to active duty shall be deemed to be the commencement of a new and separate Seafarer's Agreement under the same terms and conditions set forth herein and said terms will be in force and effect until such time as a new Seafarer's Agreement is executed.

3. G. If the Seafarer's scheduled work assignment falls during a wet dock or dry dock. Seafarer may be signed off the assigned vessel prior to said wet dock/dry dock and, if so, will not be under CCL's employ during said periods of time. If the Seafarer remains on the vessel during said periods, he/she does so as a business invitee until the vessel is returned to navigation.

4. Seafarer acknowledges that as a Seafarer he/she is required at all times to comply with and abide by the assigned vessel's rules and regulations; the Team Carnival Handbook, as well as all other oral and written rules, regulations and standards of CCL and/or of the operator of the assigned vessel and/or of the ship's command for the assigned vessel. Any violation of any such rules, regulations, policies, procedures and/or standards may result in disciplinary action, up to and including automatic termination. This Agreement in no way diminishes or modifies the Seafarer's independent duties as a Seafarer to comply with any such rules, regulations, policies, procedures and/or standards.

5. This Seafarer's Agreement constitutes the sole and entire employment agreement of the parties. There are no prior or present agreements, representations or understandings, oral or written,

which are binding upon either party, unless expressly included in the Seafarer's Agreement. No modification or change of this Seafarer's Agreement shall be valid or binding upon the parties unless in writing and executed by the party or parties intended to be bound by it.

6. *Commercial Legal Relationship.* Seafarer and Cruise Line acknowledge and agree that Seafarer's employment with CCL constitutes a commercial legal relationship between the parties.

7. ***Arbitration.*** **Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer's service on the vessel, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause.** The number of arbitrators shall be one. The place of arbitration shall be London, England, Monaco, Panama City, Panama or Manila, Philippines whichever is closer to Seafarer's home country. The Seafarer and Cruise Line must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitral proceedings shall be English. Each party shall bear its own attorney's fees, and each shall pay one half of the costs of arbitration. Seafarer agrees to appear for medical examinations by doctors designated by CCL in specialties relevant to any claims Seafarer asserts, and otherwise the parties agree to waive any and all rights to compel information from each other.

8. *Governing Law.* This Agreement shall be governed by, and all disputed arising under or in connection with this Agreement or Seafarer's service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder. The parties agree to this governing law notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.

9. *Severability.* If any provision, term, or condition of this Agreement is invalid or unenforceable for any reason, it shall be deemed severed from this Agreement and the remaining provisions, terms, and conditions of this Agreement shall not be affected thereby and shall remain in full force and effect.

The undersigned Seafarer has read, understands and accepts the terms and conditions of employment as contained and incorporated herein. It is agreed by and between Seafarer and Carnival that the parties entered freely into this Agreement. It is further agreed by the parties that the language of the Agreement cannot be construed against the drafter because it represents the parties' mutual and bargained for terms and conditions for Seafarer's employment. The Seafarer acknowledges his/her separate and independent duty to abide by all other oral and written rules, regulations and standards of

CCL and/or the vessel's operator and/or the ship's command.

In consideration for the offer of employment made herein, Seafarer accepts each and every term and condition of this Agreement, including but not limited to the at will nature of the employment and the provisions and limitations of paragraphs 2 and 3 and the arbitration/choice of law provisions in paragraphs 7 and 8. Seafarer acknowledges that CCL would not have entered into this Seafarer's Agreement or otherwise employed Seafarer if Seafarer had not agreed to all such terms and conditions. Thus the application for employment having been accepted by CCL and the terms and conditions of employment having been agreed by and between both the Seafarer and CCL, the undersigned hereby enter into this Seafarer's Agreement this *10* day of *10-05*,

By: */s/*
Seafarer's Signature

By:*/s/*
Representative, CCL

PULIYURUMPIL
MATHEW THOMAS
/ 240515

Print Name/
Crew I.D. Number

/s/ Amanda Paul
Print Name/
Crew I.D. Number